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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

In re: WESTERN STATES WHOLESALE NATURAL GAS ANTITRUST LITIGATION	MDL Docket No. 1566 CV-S-03-1431-PMP (PAL) BASE FILE
THIS DOCUMENT RELATES TO: BRECKENRIDGE BREWERY OF COLORADO, LLC, *et al.*, Plaintiffs, v. ONEOK INC., *et al.*, Defendants.	**Case No. CV-S-06-1351-PMP (PAL)**

DEFENDANTS' JOINT OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND TO ADD A TREBLE DAMAGES CLAIM

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I. INTRODUCTION[1]

Throughout this litigation, including the summary judgment proceedings, Plaintiffs have aggressively (and incorrectly) argued that they are entitled to full refund damages and have explicitly and repeatedly rejected any claim for actual damages. Plaintiffs made a strategic choice to sue for full refunds and not to sue for actual damages. This was neither an oversight nor "excusable neglect."

Before the Court ruled that they were not entitled to seek full refund damages against non-contracting defendants, Plaintiffs never claimed that they sought actual damages. Indeed, Plaintiffs have repeatedly argued that this case, premised exclusively on full refunds, is "critically different" from other cases in which plaintiffs seek actual damages. Plaintiffs' strategic choice is evident from the papers they filed after Defendants moved for summary judgment on the ground that Plaintiffs lacked standing to seek full refunds. Plaintiffs' opposition only challenged the standing issue, without arguing that summary judgment was improper because they also sought actual damages. And simultaneous with filing that opposition, Plaintiffs moved to amend their Complaint for the sole purpose of adding a new defendant; Plaintiffs deliberately and explicitly did not want to add a claim for actual damages before the Court ruled on whether they had standing to pursue full refunds.

Now, having lost on the full refund standing issue, Plaintiffs are trying to salvage their case by citing general legal principles in favor of granting amendment where a plaintiff has acted diligently; they again seek leave to amend their Complaint, this time to finally add a damage claim

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[1] In a desperate effort to salvage their case, Plaintiffs filed two motions: (1) Motion for Reconsideration; and (2) Motion for Leave to Amend to Add a Treble Damages Claim. Because the Motion for Reconsideration also argues that Plaintiffs should be allowed to amend their Complaint to add a claim for damages, Defendants fully address both the reconsideration issue and the amendment issue in their Opposition to the Motion for Reconsideration. However, as Plaintiffs also filed a separate Motion for Leave to Amend, Defendants file this separate Opposition to the Motion for Leave to Amend which specifically addresses this alternate relief from judgment sought by Plaintiffs.

they knew was available, but deliberately eschewed, since this case was filed. Contrary to prevailing law, Plaintiffs argue they are entitled to a "do-over" in which they are relieved from their unsuccessful strategic choice to seek a potentially lucrative full refund remedy in lieu of damages. It is well settled that courts will not abide parties engaging in tactical maneuvers to force the court to consider various theories seriatim. Consistent with Ninth Circuit and other federal authority, this Court should reject Plaintiffs' efforts to test their theories in such piecemeal fashion.[2]

II. BACKGROUND

Plaintiffs filed their action for violation of the Colorado Antitrust Act on May 19, 2006. *Breckenridge Brewery of Colorado, LLC et al. v. Oneok, Inc. et al.*, 2:06-CV-01351-MPM-PAL ("*Breckenridge*"), Notice of Removal, Doc. #2. In their Complaint, Plaintiffs' monetary claim was limited to full consideration refunds pursuant to Colorado Revised Statutes section 6-4-121.[3] *Id.*

On October 30, 2006, Plaintiffs filed a "Motion to Create a New MDL Matter for Full Consideration Cases," which requested that this case, along with the *J.P. Morgan Trust Co. v. The Williams Companies, et al.*. and *Learjet, Inc. et al. v. ONEOK, Inc., et al.*, cases, be transferred from MDL No. 1566 to a new MDL matter on the ground that these cases requested a "full consideration" remedy which made these cases "critically different" from cases requesting actual damages remedy. Judicial Panel on Multidistrict Litigation ("MDL Panel"), *In Re Western States Wholesale Natural Gas Antitrust Litigation,* MDL 1566, CV-S-03-1431-PMP (PAL) ("*In Re Nat. Gas Antitrust Litig.*"), Motion to Create a New MDL Matter for Full Consideration Cases, dated October 30, 2006 at p. 3. Plaintiffs' motion was summarily stricken by the Judicial Panel on Multidistrict Litigation. MDL

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[2] All Defendants named in Plaintiffs' proposed Amended Complaint join in this Opposition. Duke Energy Carolinas, LLC, f/k/a Duke Energy Corporation, Reliant Energy Inc., CenterPoint Energy, Inc. and CMS Energy Corporation join in this opposition because they were named as Defendants in Plaintiffs' proposed Amended Complaint, but do so without waiving and without prejudice to renewing their motions to dismiss on the grounds of lack of personal jurisdiction

[3] Counsel for Plaintiffs has filed suit in *Arandell Corp., et al v. Xcel Energy, Inc., et al.* seeking both full refund and standard antitrust damages. *See Arandell Corp., et al v. Xcel Energy, Inc., et al.*, CV-S-07-1019-PMP (PAL) ("*Arandell*"), Second Amended Complaint, Doc. # 183 at p. 57.

Panel, *In Re Nat. Gas Antitrust Litig.*, Order Striking Pleading, dated November 3, 2006 at p. 1. Similarly, in a related MDL 1566 matter, counsel for Plaintiffs filed a "Motion to Appoint Separate Lead Counsel in the Full Consideration Cases" arguing that the cases requesting "full consideration" were so different from the earlier-filed cases in MDL 1566 requesting treble damages under federal and state law that separate lead counsel should be appointed to represent the interests of the plaintiffs in the "full consideration" cases. *See Learjet, Inc., et al. v. Oneok, Inc., et al.*, MDL 1566 2:06-CV-00233-PMP-PAL, Plaintiffs' Motion to Appoint Separate Lead Counsel for the Full Consideration Cases, Doc. # 55 at p. 4. Additionally, in their Opposition to Defendants' Motion to Dismiss this case on the basis of the federal preemption and the filed rate doctrine, Plaintiffs argued at length that this and the other cases requesting a "full consideration" remedy were "fundamentally different" from the earlier-filed cases in MDL 1566 requesting treble damages under federal and state law. *Breckenridge*, Plaintiff's Response to Defendants' Motion to Dismiss on Preemption and Filed Rate Grounds, Doc. # 481 at p. 12-16.

On September 7, 2007, Defendants brought a Motion for Summary Judgment in which they argued that that Plaintiffs lacked standing to seek full consideration refunds under Colorado Revised Statutes section 6-4-121 because Plaintiffs did not purchase natural gas directly from any named Defendant. *Breckenridge*, Motion for Summary Judgment, Doc. # 73; *Breckenridge*, Response to Motion for Summary Judgment, Doc. # 103. On October 12, 2007, the same day that they opposed the Motion for Summary Judgment, Plaintiffs sought leave to amend their Complaint to add a new defendant; neither in their Opposition, nor in their previous motion to amend, did Plaintiffs claim that they sought anything but full consideration refunds. *Breckenridge*, Motion to Amend Complaint, Docs. # 104-105.

On February 19, 2008, this Court granted Plaintiffs' motion to amend the Complaint to add the new Defendant. In the same order the Court granted summary judgment in favor of all moving Defendants other than Xcel Energy, Inc. The Court held that Plaintiffs had no basis to assert a claim under Section 6-4-121 for full consideration refunds against any Defendant from whom Plaintiffs

did not directly purchases gas. *Breckenridge*, Order Granting Defendants' Motion for Summary Judgment, Doc. #131 ("Order"). On that basis, the Court granted Defendants' Motion for Summary Judgment as to those Defendants for whom Plaintiff had presented no evidence of direct purchases. *Id.*

Plaintiffs now move the Court to reconsider its grant of Defendants' Motion for Summary Judgment and have moved to amend their Complaint for a second time to include a new damage claim.

III. DISCUSSION

A. Courts Do Not Allow Tactical Maneuvering to Test Legal Claims Through Seriatim Amendment of Pleadings.

The Ninth Circuit and other federal courts do not permit amendments where a plaintiff is trying to assert a new claim based upon facts known or easily discoverable since the beginning of the lawsuit. *See Royal Insurance Co. of America v. Southwest Marine*, 194 F.3d 1009, 1016-17 (9th Cir. 1999); *Stein v. United Artists Corp.*, 691 F.2d 885, 898 (9th Cir. 1982); *Kirby v. P. R. Mallory & Co.*, 489 F.2d 904, 912 (7th Cir. 1973). Courts have held that permitting such amendments, particularly after an order granting summary judgment, would undermine the value of pretrial procedures like summary judgment. *Freeman v. Continental Gin Co.*, 381 F.2d 459, 469-70 (5th Cir. 1967).

When a plaintiff attempts to add new theories (which are not premised on new facts) after a dispositive motion has been granted, the burden is on plaintiff to explain why it did not fully develop those theories originally. *See Stein*, 691 F.2d 885 at 898; *Allen v. City of Beverly Hills*, 911 F.2d 367, 374 (9th Cir. 1990); *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 598 (5th Cir. 1981). The *Dussouy* court has noted that where the "the trial court has disposed of the case on the merits, as in the case of summary judgment" the movant should demonstrate a valid basis for not pursuing the theories originally. *See Dussouy*, 660 F.2d at 598 n.2. Plaintiffs have failed to satisfy their burden and have not proffered any reason why they did not pursue the alternative damage

theory at the outset of this case.

In a case such as this, where Plaintiffs strategically pursued a more lucrative full refund theory, and deliberately omitted a lower-yield damage-based alternative, denial of leave to amend after summary judgment is appropriate. *See Dussouy*, 660 F.2d at 598-99. In *Royal Insurance Co.*, after the district court granted summary judgment in favor of defendants, plaintiffs sought leave to file a third amended complaint to assert new claims. 194 F.3d at 1016. The district court denied leave to amend, and plaintiff appealed. The Ninth Circuit, while observing the same general policy in favor of amendment relied upon by the Plaintiffs in this case, nonetheless found that plaintiffs' third amended complaint "did nothing more than reassert an old theory of liability based on previously-known facts." *Id.* at 1017. The court further observed that "late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." *Id.* (quoting *Acri v. Int'l Assoc. of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986)); *see also Stein*, 691 F.2d at 898 (no abuse of discretion in denying motion to file amended complaint where amended complaint was submitted after district court granted defendants' motions to dismiss, and plaintiff "provided no satisfactory explanation for [its] failure to fully develop his contentions originally, and the amended complaint was brought only to assert new theories, if anything, and was not premised upon new facts.").

Other circuits follow the same logic prohibiting a plaintiff from adding new theories seriatim. In *Kirby*, the plaintiff's complaint included a reference to the Clayton Act in a Robinson-Patman Act claim, but did not state a Clayton Act claim. 489 F.2d at 912. The district court denied plaintiff leave to amend to explicitly add a Clayton Act claim after defendant's summary judgment motion was reset for oral argument. *Id.* The district court had concluded that the mere citation to the Clayton Act did not provide sufficient notice to defendant, and thus the pleading did not state a Clayton Act claim. *Id.* In upholding the trial court's denial of the motion to amend, the Seventh Circuit observed that the amendment contained no facts unknown to plaintiff at the outset of the

action, and concluded that "[i]t is clearly unfair to [defendant] to permit [plaintiff] to remain mute for this period and then to bolster his pleading to prevent an anticipated adverse judgment." *Id.*

Likewise, in *Freeman*, the Fifth Circuit applied the same legal doctrine to a belated amendment to an answer and counterclaim. There, the court found that the facts on which a proposed new counterclaim was based were fully known to the moving party from the outset of the lawsuit, but were alleged under a different theory. 381 F.2d at 469. As the court observed, "[i]t was not until that theory was rejected by the trial court…that the amendment was tendered seeking to make out a showing of fraud from those facts." *Id.* The court also explained why amendments to pleadings are disfavored after rulings on motions for summary judgment:

> Much of the value of summary judgment procedure . . . would be dissipated if a party were free to rely on one theory in an attempt to defeat a motion for summary judgment and then, should that theory prove unsound, come back long thereafter and fight on the basis of some other theory.

Id. at 469-70.

The cases relied upon by Plaintiffs for the general proposition that denial of leave to amend after summary judgment is not always appropriate do not help them here. In fact, one of those cases discusses the very reasons that Plaintiffs' own motion should be denied. The court in *Dussouy* allowed an amendment where a plaintiff mistakenly believed that certain facts were not necessary to his claim, and had acted in good faith with respect to a previous amendment. 660 F.2d at 598-99. However, the court cautioned that

> [i]n other circumstances, that awareness of facts and failure to include them in the complaint might give rise to the inference that the plaintiff was engaging in tactical maneuvers to force the court to consider various theories seriatim. In such a case, where the movant first presents a theory difficult to establish but favorable and, only after that fails, a less favorable theory, denial of leave to amend on the grounds of bad faith may be appropriate.

Id. at 599.

The other cases relied upon by Plaintiffs neither address, nor justify raising various theories

seriatim.[4] *United States v. Vorachek*, 563 F.2d 884 (8th Cir. 1977) stands only for the proposition that amendment may be proper where there was no bad faith or dilatory motive by the plaintiff. There, the United States Department of Justice ("DOJ") brought suit against defendants for unpaid tax liability. The DOJ moved for summary judgment for the unpaid balance due as indicated by tax assessments conducted by the IRS. *Id.* at 885. Summary judgment was granted, but several months later, the tax assessments were supplemented by the IRS (without prior knowledge by the DOJ). *Id.* at 886. When the DOJ sought to vacate the order granting summary judgment and amend to allege the new amount, the Eighth Circuit allowed amendment because the government's delay was not due to any bad faith or dilatory motive.[5] *Id.* at 887; *see also S.E.C. v. Gonzalez de Castilla*, 184 F. Supp. 2d 365, 382-84 (S.D.N.Y. 2002) (the plaintiff acquired information regarding additional improper transactions after filing its initial complaint, and sought amendment of that complaint less than four months later; the district court did not find any undue delay, and permitted amendment); *Adams v. Gould, Inc.*, 739 F.2d 858 (3d. Cir. 1984) (where plaintiff had raised alternative theory

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[4] In addition to the cases discussed below, Plaintiffs rely on *Foman v. Davis*, 371 U.S. 178, 182 (1962), but there, the court did not engage in any analysis of undue delay or bad faith; rather, it simply found an abuse of discretion where the lower court denied leave to amend without any justifying reason.

[5] In their accompanying Motion for Reconsideration, Plaintiffs speciously imply similar diligence by asserting that the Ninth Circuit ruling in *E. & J. Gallo Winery v. Encana Corporation* created a "new" treble damages claim. *See* Plaintiffs' Memorandum in Support of Plaintiff's Motion for Reconsideration ("Mot. for Reconsid.") at 19; *E. & J. Gallo Winery v. Encana Corp.* ("*Gallo*"), 503 F.3d 1027, 1045-48 (9th Cir. 2007). The fallacy in Plaintiffs' argument that *Gallo*'s ruling regarding the filed rate doctrine should somehow excuse their untimely effort to amend their Complaint after losing on summary judgment is demonstrated by their filings one month after the *Gallo* opinion issued on September 19, 2007. On October 12, 2007, Plaintiffs filed two pleadings which made clear that nothing in *Gallo* altered their strategic decision to pursue refunds – and not damages – in this case. First, Plaintiffs actually sought leave to amend their Complaint, but only to add an additional party to try to remedy their standing problem with their refund claims. Tellingly, Plaintiffs chose not to add a treble damage claim one month after *Gallo* was decided. Motion to Amend Complaint, *Breckenridge*, Docs. # 104-105. Equally damning, in their opposition to Defendants' Rule 56 motion, also filed one month after *Gallo*, Plaintiffs never argued that the motion was defective for failing to address the damage theory Plaintiffs would now like to pursue. Response to Motion for Summary Judgment, *Breckenridge*, Doc. # 103. The reason is clear: before Plaintiffs lost on their refund theory, they had no interest in pursuing a damage claim, regardless of *Gallo*.

during summary judgment briefing, the Third Circuit granted amendment, finding that plaintiff had diligently raised that alternative theory). In each of those cases, the court granted leave to amend after finding that the plaintiffs had diligently sought the amendments after new information came to light.[6]

B. Plaintiffs' Tactical Maneuver of Seeking Actual Damages Only After Failing to Establish the Viability of a Claim For Full Consideration Damages Is Improper.

In the case at hand, Plaintiffs run afoul of well-settled law that prohibits parties from engaging in tactical maneuvers to force the court to consider various theories seriatim. As criticized by the *Dussouy* court, Plaintiffs are doing nothing more than trying to seek an alternative theory of damages after failing to establish that they were entitled to full consideration refunds against all Defendants. *See Dussouy*, 660 F.2d at 599.

Plaintiffs have both ignored and failed to satisfy their burden of explaining why the actual damages theory could not have been pled at the outset of this litigation, and do not even attempt to provide any justification for their piecemeal assertion of their theories for monetary relief. Plaintiffs' failure is unavoidable, because they knew of their ability to claim actual damages but made the tactical choice from the inception of this lawsuit to seek full-consideration refunds instead. The same Plaintiffs' counsel involved in this case have previously included actual damages in their other MDL gas index cases. For example, in *Arandell*, five months before the filing of the

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[6] Plaintiffs also argue that *Henry v. Circus Circus Casinos, Inc.*, 223 F.R.D. 541 (D. Nev. 2004) – a case cited by this Court for the proposition that every defendant in an action must have at least one plaintiff that can assert a valid claim against it – requires this Court to *sua sponte* permit Plaintiffs to amend to belatedly assert a claim that it chose not to raise for tactical reasons. Motion at 5. However, the court did not address whether new *claims* (that were available at the outset of the case) could be added. Instead, the court was faced with the question of whether a plaintiff, having a cause of action against a single defendant, has standing to maintain a class action against an unrelated group of defendants who have engaged in similar conduct. *Id.* at 543. Recognizing an assumption in the Ninth Circuit that standing exists, and applying the rule that each defendant must have one plaintiff, the court permitted plaintiff to join other named plaintiffs within the class in order to establish standing for each defendant. *Id.* at 544. There is no such presumption of standing here.

Complaint in this case, the same attorneys alleged one count of actual damages, and another count for refund damages. *See Arandell*, Second Amended Complaint, Doc. # 183 at p. 57. The fact that Plaintiffs have always known of their ability to allege actual damages is supported by Plaintiffs' motion, in which they admit that their actual damage claim did not require the discovery of any new information: "the treble damages remedy arises out of defendants' manipulation of natural gas prices between 2000 and 2001 that led to inflated natural gas prices in Colorado, the same conduct from which the full consideration remedy comes." Motion at p. 3.[7]

Despite their full knowledge of the availability of the standard antitrust damage claim, Plaintiffs have not only failed to seek such damages, they have affirmatively rejected any claim for actual damages. Since the case was filed, Plaintiffs have had every opportunity to seek amendment prior to the Court's ruling granting summary judgment. Plaintiffs filed this case nearly two years ago, vigorously opposed Defendants' Motion for Summary Judgment, and even successfully amended the Complaint to add a party during the summary judgment proceedings. However, Plaintiffs never suggested that they were interested in pursuing an actual damage claim. *See* Order at pp. 15-16. During the summary judgment briefing, Defendants even highlighted that Plaintiffs were intentionally seeking full-consideration damages instead of actual damages. *See Breckenridge*, Defendants' Reply Memorandum in Support of Motion for Summary Judgment, Doc. # 114. at p. 5. Plaintiffs responded with a lengthy surreply in which they argued extensively in favor of their claim for standing under the full consideration statute; not once did Plaintiffs suggest that they were seeking actual damages as well.[8] *See generally Breckenridge*, Plaintiffs' Surreply in Opposition to

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[7] Plaintiffs take that position in the context of their argument that the amendment relates back to the date of the original Complaint, so as to avoid a statute of limitations bar. Plaintiffs should not be permitted to rely on the similarity of operative facts in order to avoid the statute of limitations, and then ignore those same facts in an effort to convince the Court that it should give them another chance to amend due to their failed tactical decisions.

[8] In Plaintiffs' Motion for Reconsideration, filed along with their Motion to Amend, Plaintiffs disingenuously argue, for the first time, that their original Complaint sought actual damages. For a more detailed discussion on the fallacies of this argument, Defendants direct to the Court to (continued...)

Summary Judgment, Doc. # 115-2. Moreover, Plaintiffs have repeatedly distinguished this case from other cases seeking actual damages on the basis that seeking full consideration in this case was critically different from cases seeking actual damages. MDL Panel, *In Re Nat. Gas Antitrust Litig.*, Motion to Create a New MDL Matter for Full Consideration Cases, dated October 30, 2006 at p. 3; *See Learjet, Inc., et al. v. Oneok, Inc., et al.*, MDL 1566 2:06-CV-00233-PMP-PAL, Plaintiffs' Motion to Appoint Separate Lead Counsel for the Full Consideration Cases, Doc. # 55 at p. 4.; *Breckenridge*, Plaintiff's Response to Defendants' Motion to Dismiss on Preemption and Filed Rate Grounds, Doc. # 481 at p. 12-16.[9]

Only after the Court rejected their arguments with respect to full-consideration damages did Plaintiffs reluctantly conclude that an actual damage claim was necessary to keep their case alive. But as the court observed in *Dussouy*, "where the movant first presents a theory difficult to establish but favorable and, only after that fails, a less favorable theory, denial of leave to amend on the grounds of bad faith may be appropriate." 660 F.2d at 599. Plaintiffs should not be permitted to engage in these tactical maneuvers, and the Court should deny leave to amend.

(...continued)
Defendants' Opposition to that Motion. Moreover, it is disingenuous for Plaintiffs to simultaneously argue that their original Complaint sought actual damages, and also that they should be entitled to amend to state the same claim.

[9] In their opposition to remand of the *Arandell* case, filed in the U.S. District Court for the Western District of Wisconsin, Plaintiffs argued at length that their case was "remarkably different" from most antitrust cases in that Plaintiffs were requesting the "full consideration" remedy available under Wisconsin law. *Arandell*, Memorandum in Support of Plaintiffs' Motion to Remand, Doc. # 23 at p. 2.

IV. CONCLUSION

For the reasons set forth herein, Plaintiffs' Motion for Leave to Amend should be denied.

Respectfully submitted,

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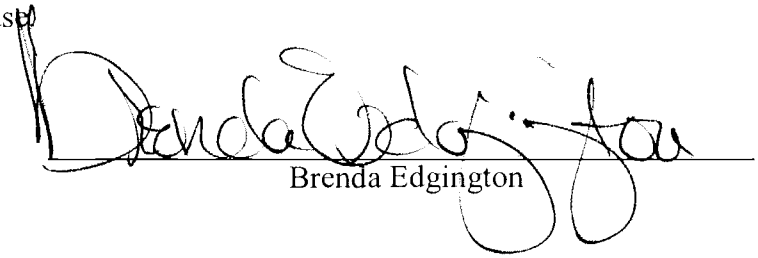
CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2008, a true and correct copy of the foregoing **DEFENDANTS' JOINT OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND TO ADD A TREBLE DAMAGES CLAIM** was served by first class mail on plaintiff's counsel, as listed below, and was electronically transmitted to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants in this case.



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